TCI of New York, Inc. (Schenectady System) *and* International Brotherhood of Electrical Workers, Local 166, AFL–CIO. Case 3–CA–14628

February 26, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

Upon a charge filed on October 7, 1988, by International Brotherhood of Electrical Workers, Local 166, AFL–CIO, the Union, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on January 6, 1989. The complaint alleges that the Respondent, TCI of New York, Inc., has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by unilaterally discontinuing its practice of granting annual bonuses to unit employees. The Respondent filed a timely answer to the complaint, admitting in part and denying in part the allegations of the complaint, denying the commission of unfair labor practices, and raising affirmative defenses.

On April 14, 1989, the General Counsel, the Union, and the Respondent filed a joint motion to transfer case to the Board and a stipulation of facts. The parties agreed that the charge, the complaint and notice of hearing, the Respondent's answer, and the stipulation of facts, including attachments, would constitute the entire record in this case and that no oral testimony is necessary or desired by any of the parties. The parties further stipulated that they waived a hearing before an administrative law judge, the making of findings of fact and conclusions of law by the administrative law judge, and the issuance of an administrative law judge's decision. The parties agreed that the Board should issue its decision containing findings of fact and conclusions of law and an order.

On August 10, 1989, the Board issued an order approving the stipulation and transferring the proceeding to the Board. Thereafter, the General Counsel and Respondent filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this proceeding, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation, is engaged in the operation of a community cable antenna television system at its principal office and place of business in Schenectady, New York. During the 12-month period preceding the parties' stipulation of facts, a representative period, the Respondent derived gross revenues in excess of $500,000 and purchased and received goods and services valued in excess of $100,000 directly from points located outside the State of New York. It is admitted, and we find, that at all times material, the Respondent is, and has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Stipulated Facts*

On April 5, 1974, the Union was certified as the representative of a unit of installer-technicians and service personnel employed at the Schenectady facility. At all material times, the Union has been and is the certified collective-bargaining representative of employees in the following unit:

> All installers, technicians and service personnel in the classifications set forth in Appendix A of the parties' 1988–1991 agreement; excluding all other employees, office clerical employees, sales personnel, telemarketers, salesmen, audit employees, professional employees, confidential employees, managerial employees, Community Relations Director (i.e., Access Coordinator), Assistant to the Community Relations Director and Channel 16 non-employee assistants and helpers, guards and supervisors as defined in the Act.

Since the Union was certified, the parties have entered into successive collective-bargaining agreements, the most recent of which covers the period July 1, 1988, to June 30, 1991. The preceding agreement was in effect from July 1, 1985, to June 30, 1988. The current agreement, negotiations for which commenced in May 1988, was ratified by unit employees in late July 1988. Currently, the unit has approximately 17 unit employees.

Each year, from about 1977 until 1988, the Respondent provided all employees, both unit and nonunit, with a bonus program based on the number of subscribers enrolled. Until 1988, the bonus program paid each employee up to $75 for each calendar quarter in which the Respondent achieved its projected increase in subscriptions. The employees received the bonuses in a lump sum during the first quarter of the following calendar year. Thus, the Respondent paid the 1987 bonuses to employees in February 1988, when each employee (unit and nonunit) at the Schenectady facility received $150.

The parties' current collective-bargaining agreement contains no reference to the bonus program. None of the preceding agreements referred to the bonus pro-

gram. Neither party raised the subject of bonuses during negotiations for the 1988–1991 agreement; nor did the parties raise the issue of bonuses during the preceding contract negotiations.

In the summer of 1988, the Respondent designed a new bonus program applicable to employees at the Schenectady facility. Under the redesigned program, the Respondent placed in a pool $10 for each net additional subscriber to basic television service and $4 for each net additional subscriber to premium services signed from January 14–June 30, 1988. The Respondent made the first bonus payment under the new program on August 11, 1988. Employees deemed eligible by the Respondent to participate in the program each received approximately $760. The Respondent made no general announcement regarding the bonus to the bargaining unit employees. The Respondent did not provide any notification prior to August 11 to the Union or to the unit employees that it was excluding the unit employees from the redesigned bonus program. Approximately 1 week after the bonus checks were distributed to nonunit employees, the Respondent's general manager, Allan Sagendorf, advised the Union's stewards that the unit employees were not eligible for the bonus because the 1988–1991 collective-bargaining agreement did not provide for its payment.

The current agreement provides in part:

ARTICLE XXXI

SCOPE OF BARGAINING

A. The Employer and the Union acknowledge that during the negotiations which resulted in this Agreement, each party had and exercised the unlimited right and opportunity to make demands and proposals with respect to any and all lawful and proper subjects of collective bargaining. *This Agreement fully and completely incorporates all such understandings and agreements and supersedes all prior agreements, understandings and past practices, oral or written, express or implied.* [Emphasis added.] Accordingly, this Agreement alone shall govern the entire relationship between the parties and shall be the sole source of any and all rights which may be asserted in arbitration hereunder or otherwise.

B. By reason of the foregoing, the Employer and the Union, for the duration of this Agreement, voluntarily and unqualifiedly waive any and all rights to negotiate, discuss or bargain collectively with respect to any subject not specifically referred to or covered by this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or executed this Agreement.

The language of article XXXI of the current agreement differs from the ''Scope of Bargaining'' provision of the preceding agreement, which provided as follows:

ARTICLE XXVII

SCOPE OF BARGAINING

The Employer and the Union acknowledge that during the negotiations which resulted in this Agreement, each party had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union for the term of this Agreement each voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, including fringe benefits, even though such subject or matter may not have been within the knowledge or contemplation of the parties at the time they negotiated or signed this Agreement.

The Respondent proposed the change in the language of the ''Scope of Bargaining'' provision (art. XXXI) quoted above during the 1988 contract negotiations. The Respondent drafted the language in full knowledge of and reliance on *Columbus & Southern Ohio Electric Co.*, 270 NLRB 686 (1984), enfd. sub nom. *Electrical Workers IBEW Local 1466 v. NLRB*, 795 F.2d 150 (D.C. Cir. 1986), although the language of article XXXI differs from the language in the zipper clause at issue in *Columbus*.[1] The Respondent did not communicate to the Union its knowledge of and reliance on the Board's decision in *Columbus.*

Although the Union initially opposed any change in the language of the ''Scope of Bargaining'' provision, it ultimately accepted the Respondent's proposal. There was no discussion during negotiations regarding the purpose or meaning of the new language or of the effect of the new language, if any, on the bonus program

[1] The zipper clause in *Columbus* provided that:

It is the intent of the parties that the provision[s] of this Agreement will supersede all prior agreements and understandings, oral or written, expressed or implied, between such parties and shall govern their entire relationship and shall be the sole source of any and all rights or claims which may be asserted in arbitration hereunder or otherwise.

The Union for the life of this Agreement hereby waives any rights to request to negotiate or bargain with respect to any matters contained in this Agreement.

270 NLRB at 686.

or any other term or condition of employment or past practice.[2]

B. *Contentions of the Parties*

The General Counsel makes the following contentions: that the yearly bonus had become an established term and condition of employment for unit employees, which the Respondent could not change or eliminate without bargaining with the Union; that the Union did not waive its right to bargain regarding the Respondent's unilateral elimination of the yearly bonus to unit employees; that, absent evidence that the parties bargained over the issue of the bonuses, the zipper clause in the 1988–1991 agreement does not constitute a waiver by the Union of its right to bargain over the bonuses; that the Respondent's change in its method of computing the amount of the bonus and the timing of the payments does not privilege it to refuse to continue extending the bonus program to unit employees; and that, by unilaterally eliminating the yearly bonus, the Respondent, in contravention of Board law, has tried to use the zipper clause as a ''sword'' to alter the status quo, rather than as a ''shield'' to avoid bargaining over issues that the parties had already decided.[3] Accordingly, the General Counsel contends that the Respondent unlawfully refused to bargain about its plans to discontinue the bonus and unilaterally altered the terms and conditions of employment of unit employees in violation of Section 8(a)(5) and (1) of the Act.

The Respondent argues as follows: that the pre-1988 bonus program was a unilaterally bestowed past practice that falls within the purview of article XXXI of the 1988–1991 agreement and thus is superseded by the terms of that agreement; that the express language of article XXXI presumptively constitutes a clear and unequivocal waiver of the right to bargain over the elimination of any past practice, including the subscriber growth bonus; that the Union's agreement to the language of article XXXI constitutes a clear and unmistakable waiver of its right to bargain over the elimination of the subscriber growth bonus; and that there is no extrinsic evidence rebutting the Union's clear and unmistakable contractual waiver of that right. The Respondent further argues that the parties' failure to raise the bonus during the negotiations, despite the opportunity to do so, demonstrates that the parties intended that the bonus program would no longer be an element of unit employees' compensation.[4]

C. *Discussion and Conclusions*

There are, as the parties stipulated, no factual issues to be resolved. For about 11 years, the Respondent accorded its unit and nonunit employees a share in a yearly bonus program, and in 1988, this program was discontinued without notice to the Union. It is well settled that a bonus paid consistently over a number of years is a component of employee wages and a term and condition of employment, even though not expressly provided for in the bargaining agreement, and that it cannot be unilaterally altered or abolished by the employer without affording the Union notice and an opportunity to bargain. *Gas Machinery Co.*, 221 NLRB 862, 865 (1975). Thus, the Respondent's unilateral discontinuation of the bonus program constitutes an unlawful refusal to bargain unless, as the Respondent contends, the Union has waived its right to bargain over this matter. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The right to be consulted on changes in terms and conditions of employment is a statutory right; thus, to establish that it has been waived the party asserting waiver must show that the right has been clearly and unmistakably relinquished. Whether such a showing has been made is decided by ''an examination of all the surrounding circumstances including but not limited to bargaining history, the actual contract language, and the completeness of the collective-bargaining agreement.'' *Columbus & Southern Ohio Electric Co.*, 270 NLRB 686, 686 (1984), citing *Bancroft-Whitney Co.*, 214 NLRB 57 (1974) (other citations omitted). We find that the Respondent has made such a showing and that its unilateral discontinuation of the bonus program for unit employees did not violate Section 8(a)(5) and (1).

As an initial matter, we note that the bonus for unit employees is a ''prior . . . past practice,'' and we find that it falls under the language of article XXXI as proposed during the 1988 negotiations and agreed to by the Union. Thus, the focus of our inquiry is on what effect, if any, the parties' agreement to article XXXI had on the Respondent's obligation to continue paying the bonus to unit employees or bargain with the Union if it contemplated altering or discontinuing it. Clearly, the presence of a zipper clause in successive contracts will not, by itself, necessarily establish a waiver of bargaining rights with regard to existing terms and conditions of employment, especially when it is invoked to justify changes in existing benefits. *GTE Automatic Electric*, supra at fn. 3.

This case, however, differs from those in which a party relies on broad contractual language alone to establish that it had the right to act unilaterally with regard to an existing term of employment not covered by contract. Rather, according to the stipulated bargaining history, during the 1988 negotiations the Respondent proposed a new ''Scope of Bargaining'' provision. The

[2] The parties stipulated that, other than the express language of art. XXXI of the 1988–1991 contract, there is no extrinsic evidence bearing on the interpretation or application of art. XXXI.

[3] *GTE Automatic Electric*, 261 NLRB 1491, 1492 (1982).

[4] The Respondent also contends that, assuming arguendo that it unlawfully terminated the bonus program, it was not obligated to include unit employees in the new program. The complaint does not allege, and the General Counsel does not argue, that the Respondent's failure to include unit employees in the new program was unlawful. That issue is therefore not before us.

proposed language expressly provided that the agreement's terms would supersede ''all prior agreements, understandings and past practices, oral or written, express or implied'' between the parties. The previous agreement did not contain such a provision. Although the ''Scope of Bargaining'' clause in that contract acknowledged the completeness of the negotiations and contained a waiver of bargaining ''with respect to any subject or matter not specifically referred to or covered in this Agreement, including fringe benefits,'' it did not delineate the relationship of the contract itself to past practices or other noncontractual terms and conditions of employment.[5] By contrast, the new language purported to alter the role of the contract in the parties' relationship and to define its status with respect to ''all prior agreements, understandings and past practices.''

We conclude that the Respondent's proposal of such a definition must be viewed as a meaningful act and the proposal itself as a serious one. The proposal signified that the Respondent wished to obtain the Union's agreement to an alteration in the ground rules of the bargaining relationship and that it sought to define all of its obligations through the contract's express terms. This proposal also put the Union on notice that the Respondent was seeking such a change. The Union's resistance during bargaining to the new language demonstrates that it also took the proposal seriously and understood that it would have an impact on the final agreement and on the parties' obligations. In light of the Union's opposition to the proposal, we cannot construe the Union negotiators' failure to explore the meaning or purpose of the clause as evidence that the Union reasonably believed that prior past practices, such as the bonus at issue here, would be unaffected by the new language.[6] In short, under the circumstances of this case, the Union, by accepting the strongly worded proposal, knowingly agreed to define the bargaining relationship as the Respondent had proposed.[7]

In addition, the language of the provision itself is both broad and explicit, and contains no ambiguity to indicate equivocal intentions on the part of either party. Article XXXI states that the parties have ''exercised the unlimited right and opportunity to make demands and proposals with respect to any and all lawful and proper subjects of collective bargaining.'' After acknowledging the comprehensiveness of the bargaining, the provision then states that the agreement ''fully and completely incorporates all . . . understandings and agreements'' between the parties. This language reveals that the parties have chosen to place within the contract's four corners all agreements arising out of the negotiations. The provision then specifies its relation to pre-existing terms and conditions of employment not embodied in it: it ''supersedes all prior agreements, understandings and past practices, oral or written, express or implied.''

In our view, the language of article XXXI serves the same purpose in this agreement as it did in the parties' contract in *Columbus & Southern Ohio Electric*, supra. In affirming the dismissal of allegations that the employer violated Section 8(a)(5) and (1) by discontinuing a Christmas bonus, the court commented, on language identical in relevant part to that here, that ''[g]iven the comprehensive provisions on compensation contained within the agreement, this clause serves to set aside all prior elements of compensation and replace them with the explicit compensation provisions contained in the contract.'' *Electrical Workers IBEW Local 1466 v. NLRB*, supra, 595 F.2d at 155. In this case, as in *Columbus*, the agreement contains provisions covering a full range of terms and conditions of employment, including employee compensation. Thus, we find that under article XXXI the bonus plan is superseded by the employee compensation terms of the 1988–1991 agreement. *Bancroft-Whitney*, supra, 214 NLRB at 57.

In light of the above, we conclude that the Union has clearly and unmistakably waived its right to bargain over the discontinuance of the bonus plan. Ac-

[5] We find this case distinguishable in this and other respects from *Pepsi-Cola Distributing Co.*, 241 NLRB 869 (1979), enfd. 646 F.2d 1173 (6th Cir. 1981), in which the Board found, despite the presence of factors relied on here, i.e., the opportunity to negotiate contract terms, the specificity of the language at issue, and the completeness of the parties' agreement, that the union had not waived the right to bargain over the elimination of a bonus. In *Pepsi-Cola*, the Board inferred, in part from the employer's practice of paying the bonus even though the agreement's zipper clause on its face relieved it of the obligation to do so, that the parties intended to continue the bonus plan despite the continued presence in the contract of a zipper clause. In that case, however, unlike here, the respondent made no proposal to change the language of the zipper clause. Therefore, in that case, no event put the union on notice that the employer contemplated a change in the bargaining relationship. Compare also *Aeronca, Inc.*, 253 NLRB 261, enf. denied 650 F.2d 501 (4th Cir. 1981).

[6] Compare *Aeronca, Inc.*, supra, 253 NLRB at 265 (where no new contractual provisions were proposed or discussed during negotiations that would reasonably alert union to alteration of its rights concerning a bonus, union did not waive right to bargain about Christmas turkeys by agreeing to zipper clause carried over from previous agreements).

[7] We emphasize that our analysis does not imply that employers may rely on the broad wording of so-called ''zipper clauses'' alone to avoid bargaining over changes in terms and conditions of employment. We adhere to the well-settled view that a waiver of a statutory right must be conscious and informed. However, where, as here, parties have negotiated new contractual language expressly providing that ''past practices, oral or written'' are to be superseded by the terms of the agreement, a union may not avoid the inference that it intended to relinquish the right to demand bargaining over the employer's abandonment of a noncontractual past practice *solely* by showing that during bargaining over the provision, the union had not sought clarification of its scope and meaning and the parties had not discussed the particular practice at issue.

Our dissenting colleague appears to believe that our approach would place on the Union the unreasonable burden of guessing as to the meaning or significance of the Respondent's proposed ''zipper clause.'' In fact, our approach goes only to a failure to ask—not to a failure to guess—the meaning and effect of the proposed language. We emphasize that the Union's failure to explore the meaning of the Respondent's proposed language before agreeing to it is important here in light of the clarity of the Respondent's proposed language, which plainly called for a redefinition of the role of the contract in the parties' relationship, and the Union's initial opposition to the Respondent's proposal, which demonstrated that it was on notice that the new language would significantly affect the parties' relations.

cordingly, we further conclude that the Respondent did not violate Section 8(a)(5) and (1) of the Act as alleged and we shall dismiss the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act representing the unit of:

> All installers, technicians and service personnel in the classifications set forth in Appendix A of the parties' 1988–1991 agreement; excluding all other employees, office clerical employees, sales personnel, telemarketers, salesmen, audit employees, professional employees, confidential employees, managerial employees, Community Relations Director (i.e., Access Coordinator), Assistant to the Community Relations Director and Channel 16 non-employee assistants and helpers, guards and supervisors as defined in the Act.

3. The Respondent and the Union have at all material times been parties to a collective-bargaining agreement covering the employees in the above-described unit.

4. The Respondent has not violated Section 8(a)(5) and (1) of the National Labor Relations Act.

ORDER

The complaint is dismissed.

MEMBER CRACRAFT, dissenting.

Based solely on the parties' contractual zipper clause, my colleagues find that the Union waived its right to bargain over discontinuance of the past practice of granting annual bonuses. Because I would find there was no clear and unmistakable waiver of the Union's bargaining right, I dissent.

The parties have had a bargaining reltationship since the Union was certified in 1974. From 1977 until 1988 the Respondent provided annual bonus payments to unit and nonunit employees. None of the successive collective- bargaining agreements covering this time period referred to bonuses. The zipper clause in these contracts stated that the parties ''waive the right . . . to bargain collectively with respect to any subject . . . not specifically referred to . . . in this Agreement, including fringe benefits.

The current contract is in effect from July 1, 1988, to June 30, 1991. The current contract's zipper clause states that the document ''supersedes all prior agreements, understandings and past practices, oral or written, express or implied ¢and that the parties waive any right to bargain about any subject not specifically referred to . . . by this Agreement . . . .'' The Respondent proposed the change in language. In drafting the language, the Respondent relied on *Columbus & Southern Ohio Electric Co.*, 270 NLRB 686 (1984), enfd. 795 F.2d 150 (D.C. Cir. 1986). The parties stipulated that during bargaining there was no discussion of bonuses; the Respondent did not mention *Columbus* to the Union; the purpose or meaning of the new language was not discussed; and the effect that the new language would have on the bonus program was not discussed. Further, the parties stipulated, ''other than the express language of [the zipper clause] of the 1988–1991 contract, there is no extrinsic evidence bearing on the interpretation or application of [that clause].''

On August 11, 1988, the Respondent made bonus payments to nonunit employees. Shortly after distributing the bonuses to nonunit employees, the Respondent advised the Union's stewards that unit employees were not eligible for bonuses because the 1988–1991 contract did not provide for bonuses.

Waiver of a union's right to bargain over changes in terms and conditions of employment must be ''clear and unmistakable.'' *Metropolitan Edision Co. v. NLRB*, 460 U.S. 693, 708 (1983). In deciding whether a zipper clause constitutes a wavier, the Board does not simply look to the contractual language.[1] Instead, the Board examines the surrounding circumstances, including bargaining history and past practice. *Radioear Corp.*, 214 NLRB 362, 364 (1974), supplementing 199 NLRB 1161 (1972). In *Angelus Block Co.*, 250 NLRB 868 (1980), the Board summarized the relevant principles as follows:

> A zipper clause must meet the standard of any other form of alleged waiver. It is well established that in order to establish waiver of the statutory right to bargain in regard to mandatory subjects of bargaining, such as involved here, there must be a clear and unequivocal relinquishment of such right. Even where a zipper clause is couched in broad terms, it must appear from an evaluation of the negotiations that the particular matter in issue was fully discussed or consciously explored and the Union consciously yielded or clearly and unmistakably waived its interest in the matter. This is particularly true where, as here, an employer relies on the zipper clause to establish its freedom to unilaterally change, or institute new, terms and conditions of employment not contained in the contract.

Id. at 877 (citations omitted).

[1] In *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989), the Board reaffirmed the ''well settled'' principle that ''the waiver of a statutory right will not be inferred from general contractual provisions'' such as zipper clauses.

Given the parties' stipulation of facts, the Board must decide, based solely on the contract language, whether the zipper clause waives the Union's right to bargain about the Respondent's discontinuing the annual bonus payments to unit employees. Applying the above principles, I conclude that the zipper clause did not waive the Union's right to bargain about discontinuance of the practice of granting annual bonuses.

The stipulation of facts establishes the following: The Respondent obtained a change in contractual language; the Respondent sought the change because it desired to alter its past practice of granting annual bonuses to unit employees; the Respondent did not explain, nor did the Union inquire about, the reason for the change in language. It is inescapable on this record that the bonus program was not ''fully discussed or consciously explored.

In finding a waiver the majority relies in part on the similarity of language between the 1988–1991 contract and the zipper clause in *Columbus*. In *Columbus*, the union's actions and statements during bargaining and during the . course of a regional investigation which related to the zipper clause demonstrated its understanding that the clause to which it eventually agreed waived its right to bargain over, inter alia, the Christmas bonus which was at issue in that case. The Board recognized that the purpose of the waiver doctrine was to determine ''the parties' intent'' concerning the right in question and this determination was made ''from an examination of all the surrounding circumstances including . . . bargaining history.'' Based on review of the bargaining history—not simply based on the contract's language—the Board concluded the union ''was fully aware that all previous agreements were subject to the zipper clause.'' See *Jones Dairy Farm*, 295 NLRB 113, 115 fn. 13 (1989), and *Suffolk Child Development Center*, 277 NLRB 1345, 1350–1351 (1985) (distinguishing *Columbus*).[2] There is no similar bargaining history evidence un the instant case. Indeed, the parties expressly stipulated that ''there is no extrinsic evidence'' regarding the current zipper clause.

In sum, I believe the record shows the Respondent devised a bargaining ploy, the success of which depended on the Union's not realizing the import of the proposed change. Finding a waiver on the facts of this case converts the doctrine into the offensive weapon the Board has previously disavowed. ''As the Board has recognized, the normal function of [zipper] clauses is to maintain the status quo, not to facilitate unilateral changes.'' *Murphy Oil USA*, 286 NLRB 1039 (1987); *GTE Automatic Electric*, 261 NLRB 1491, 1493 fn. 3 (1982). See also *Pepsi-Cola Distributing Co.*, 241 NLRB 869, 869–870 (1979), enfd. 646 F.2d 1173 (6th Cir. 1981).

For these reasons, I cannot agree with my colleagues that the Union waived its right to bargain about the elimination of the bonus program. I therefore dissent from the majority's failure to find that the Respondent's unilateral discontinuance of the bonus program violated Section 8(a)(5) and (1) of the Act.

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[2] See also *General Electric Co.*, 296 NLRB 844 (1989), enfd. mem. No. 89–1628 (D.C. Cir. Oct. 5, 1990), in which *Columbus* was cited for the proposition that a waiver may be found ''when the contract language is not so specific but the history of prior contract negotiations demonstrates that the subject was discussed and consciously yielded.'' The majority asserts that the change in language put the Union on notice and the Union's initial opposition evidences that the Union took the proposal seriously. The majority, apparently, likens the Union's initial opposition to the substantial extrinsic evidence in *Columbus.* This, however, overlooks the express stipulation that there is no extrinsic evidence regarding the current zipper clause. I cannot agree that the change in wording in the 1988 bargaining compels a waiver finding. Obviously, even though the pre-1988–1991 contracts contained broadly worded zipper clauses, the Respondent could not argue the Union had waived the right to bargain about the annual bonuses because the Respondent granted bonuses to unit employees during those years. Given that the parties' stipulation of facts provides no details about the bargaining history or surrounding circumstances, I believe it inappropriate to find the 1988–1991 comprehensive zipper clause any more effective as a waiver than the comprehensive zipper clauses in the earlier contracts. The different wording alone, in the context of this case, sheds no light on the Union's intent in the 1988 bargaining.